

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEVEN CRAIG MUMMERT,

Defendant.

No. CR05-4066-MWB

**AMENDED<sup>1</sup>  
REPORT AND  
RECOMMENDATION ON MOTION  
TO DISMISS**

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This matter is before the court on motion (Doc. No. 9) of the defendant Steven Craig Mummert to dismiss the Indictment. Preliminarily, the court notes Mummert failed to file a brief concurrently with his motion, as required by Local Criminal Rule 7.1(d). See LCrR 47.1. The plaintiff (the “Government”) filed a resistance to the motion (Doc. No. 13). The day after the Government filed its resistance, Mummert filed a brief in support of his motion (Doc. No. 14), and three days later he filed a supplemental brief (Doc. No. 15). While the court usually will allow the parties to file supplemental authorities in support of their positions, Mummert was in violation of the Local Rules when he failed to file a brief concurrently with his motion. In the interests of justice, the court will consider the defendant’s briefs, but defense counsel is instructed to review and follow the Local Rules in connection with any further filings.

The court held an evidentiary hearing on Mummert’s motion to dismiss on June 30, 2005. Assistant U.S. Attorney Kevin Fletcher appeared on behalf of the Government. Mummert appeared with his attorney, F. Montgomery Brown. Mummert offered the

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<sup>1</sup>The amendment corrects a scrivener’s error, and makes no substantive changes.

testimony of ATF Special Agent Christopher Redies. The following exhibits were admitted into evidence: **Gov't Ex. 1**, Application for License filed by Scott Mack, Sportman's Den & Pawn (5 pages, attached to Doc. No. 13); **Gov't Ex. 2**, Application for search warrant dated 11-15-04 (6 pages); **Def. Ex. A**, copy of signature card from Central Bank, Storm Lake, IA, for Sportsman's Den & Pawn; **Def. Ex. B**, State of Iowa Retail Sales Tax Permit for Sportsman's Den & Pawn (1 page); **Def. Ex. C**, 2002 Schedule K-1 (Form 1065) and cover letter (4 pages); **Def. Ex. D**, copies of checks and debit memos from Central Bank, Storm Lake, IA (3 pages).

The court finds the motion has been fully submitted and is ready for consideration.

### ***BACKGROUND FACTS***

During 2004, while acting as an undercover officer, Agent Redies bought several firearms from Mummert at Sportsman's Den & Pawn in Storm Lake, Iowa. On May 17, 2005, Mummer was indicted and charged in a single count as follows:

On or about and between January 15, 2004, and November 17, 2004, both dates being approximate and inclusive, within the Northern District of Iowa and elsewhere, the defendant, STEVEN MUMMERT, not being a licensed importer, licensed manufacturer or licensed dealer in firearms, did knowingly and willfully engage in the business of dealing in firearms.

This was in violation of Title 18, United States Code, Sections 922(a)(1)(A) and 924(a)(1)(D).

Indictment, Doc. No. 1.

The statute Mummert is alleged to have violated provides as follows<sup>2</sup>:

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<sup>2</sup>Although the Indictment also states Mummert's alleged actions were "in violation of" section 924(a)(1)(D), section 924 does not specify a crime or a rule that can be "violated." Rather, section 924 (continued...)

(a) It shall be unlawful –

(1) for any person –

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce[.]

18 U.S.C. § 922(a)(1)(A).

The crux of the dispute in the case involves whether Mummert was, or was not, selling firearms without a federal firearms license. On or about July 1, 2002, a federal firearms license was issued to Scott Mack, using the trade or business name Sportsman’s Den & Pawn. See Gov’t Ex. 1. Mummert claims Sportsman’s was a partnership between Mack and himself, and the license was obtained for partnership purposes. In support of his claim that the business was a partnership, Mummert offered a signature card showing that on March 13, 2002, a bank account was opened for Sportsman’s Den & Pawn at Central Bank, Storm Lake, Iowa. The signature card shows the account was a partnership account, and it lists Steve Mummert, Scott Mack, Susan L. Mack, and Edwin Larsen as authorized signers on the account. Steve Mummert signed the Backup Withholding Certificate for the account. See Def. Ex. A. Bank records indicate both Mummert and Mack wrote checks and signed debit memos relating to the account. See Def. Ex. D.

In addition, the State of Iowa issued a Retail Sales Tax Permit to “Mummert & Mack Prts” for Sportsman’s Den & Pawn. See Def. Ex. B. And Scott Mack received

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<sup>2</sup>(...continued)

provides penalties for persons who commit certain crimes. Subsection 924(a)(1)(D) is a catchall provision that provides for a fine and/or imprisonment of one who commits a firearms violation not specifically cited in one of the other subsections of the statute.

a federal Schedule K-1 (Form 1065), Partner's Share of Income, Credit, Deductions, etc., relating to partnership loss for tax year 2002. *See* Def. Ex. C.

Mack left the business at some point, and Mummert continued to operate the business. Mummert continued to sell firearms from the business. He argues the firearms license was issued to the business, not to Mack as an individual, and therefore he was entitled to continue using the license after Mack left the business.

Mummert further points to the affidavit in support of search warrant, which identifies Sportsman's Den & Pawn as "a business that is a federally licensed firearms dealer." Gov't Ex. 1, Affidavit ¶ 2. The Affidavit further states an active license was registered to Sportsman's, with the responsible person listed as Scott Mack, but "[t]here was no record found indicating that Steve Mummert is a responsible person for the business, or that he holds a Federal Firearms License." *Id.* at ¶ 3.

The Government, on the other hand, notes that despite the fact the license itself lists the holder simply as Sportsman's Den & Pawn, *see* Gov't Ex. 1, p. 3, Mack's application does not list anyone else as a partner on line 1, and on line 6, the application indicates the business was "individually owned." *Id.*, p. 1. In addition, when the application was investigated prior to issuance of the license, the inspector's report lists the "operating name" as "Mack, Scott, Sportsman's Den & Pawn," and indicates the inspector spoke with "Mr. Scott Mack, Owner." *Id.*, p. 4. The Government argues the license was issued to Mack individually, and not to a partnership, and therefore Mummert was selling firearms without a license.

Mummert argues the Indictment should be dismissed for two reasons. First, he claims the Indictment fails to plead an essential element of the offense, to-wit: "the element of 'interstate commerce'." Doc. No. 9, pp. 2-3. Second, he argues that, "as a

matter of law,” he could not have committed the charged offense “where the transactions occurred during the pendency of a valid storefront federal firearms license.” *Id.*, pp. 3-6.

These are the issues the court must address.

## ***DISCUSSION***

### ***A. Essential Elements of the Offense***

The Eighth Circuit Court of Appeals has considered the minimum requirements for a sufficient indictment on numerous occasions. In *United States v. Cuervo*, 354 F.3d 969 (8th Cir. 2004), the court explained:

“[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); see [*United States v.*] *Dolan*, 120 F.3d [856,] 864 [(8th Cir. 1997)] (“To be sufficient, an indictment must fairly inform the defendant of the charges against him and allow him to plead double jeopardy as a bar to future prosecution.”). Typically an indictment is not sufficient only if an essential element of the offense is omitted from it. [*United States v.*] *White*, 241 F.3d [1015,] 1021 [(8th Cir. 2001)].

*Cuervo*, 354 F.3d at 983. See *Bousley v. United States*, 523 U.S. 614, 618, 118 S. Ct. 1604, 1609, 140 L. Ed. 2d 828 (1998) (“[T]he first and most universally recognized requirement of due process” is that a defendant receive “real notice of the true nature of the charge against him.”) (quoting *Smith v. O’Grady*, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859 (1941)).

Thus, the first step is to identify the essential elements of the offense with which Mummert is charged. Specifically, the court must determine whether an interstate

commerce connection is an essential element that must be charged in the Indictment. On this point, the parties disagree. Mummert argues an interstate commerce nexus is an element of the offense, while the Government argues the interstate commerce connection only applies to the second clause of section 922(a)(1)(A). Mummert argues the language “in interstate or foreign commerce” applies equally to the first clause of the statute.

The Eighth Circuit Court of Appeals has addressed the very argument Mummert raises here. In *Mandina v. United States*, the court considered “whether 18 U.S.C. § 922(a)(1) requires as an essential element of the offense of unlawful dealing in firearms or ammunition an allegation and proof such activities were in interstate or foreign commerce.” *Mandina*, 472 F.2d 1110, 1111 (1973). Mandina moved to dismiss the indictment against him because the indictment failed to allege his activities had been conducted in interstate commerce. The court held as follows:

[Section] 922(a)(1) is not ambiguous nor is its underlying legislative history equivocal. It is stated in the disjunctive and contains two clearly separate prohibitions. Qualifying words or clauses refer to the next preceding antecedent except when evident sense and meaning require a different construction. . . . The first phrase prohibits the engaging in the business of importing, manufacturing or dealing in firearms or ammunition without a license. The second proscribes the shipping, transport or receipt of firearms or ammunition in interstate or foreign commerce by an unlicensed importer, manufacturer or dealer.

Additionally, the legislative history of § 922(a)(1) specifically shows that Congress intended to proscribe unlicensed intrastate dealing in firearms. “Thus, [Section 922(a)(1)] makes it clear that a license is required for an intrastate business as well as an interstate business.” H.R. Rep. No. 1577, 90th Cong. 2d Sess., 1968 U.S. Code Cong. & Admin. News, p. 4418. *See also* S. Rep. No. 1097, 90th

Cong. 2d Sess., 1968 U.S. Code & Admin. news, pp. 2114, 2202.

*Mandina*, 472 F.2d at 112.

Accordingly, the *Mandina* court held the Government did not have to show the defendant's dealings in firearms were in interstate or foreign commerce as an element of the crime charged. *Id.* The court further found section 922(a)(1) to be constitutional. *Mandina*, 472 F.2d at 1113-14. *See also Gonzales v. Raich*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 2195, 2205 (June 6, 2005) ("Our case law firmly establishes Congress'[s] power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.") (citing *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128-29, 63 S. Ct. 82, 87 L. Ed. 122 (1942)).<sup>3</sup>

Thus, the argument raised by Mummert in the present case has already been considered, and rejected, by the Eighth Circuit. Mummert has not presented any authority to support a contrary decision by this court, and his motion should be denied on this basis.

### ***B. Whether Mummert was Operating Under a Valid License***

Mummert argues the Indictment should be dismissed because the undisputed facts show the Indictment fails to state an offense. Doc. No. 14, pp. 4-5 (citing *United States v. Phillips*, 367 F.3d 846, 855 nn. 24 & 25 (9th Cir. 2004)). He argues it is undisputed that he and Mack were involved in a partnership, the partnership had a valid license, and

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<sup>3</sup> Although there was some indication at the hearing that Mummert might file a further motion challenging the constitutionality of section 922(a)(1)(A) on the basis of *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the defendant has informed the court by letter dated July 6, 2005, that no such motion will be filed.

he continued operating under that license after Mack left the partnership. On the contrary, the court finds these facts are hotly disputed. The Government disputes the business was a partnership, or that Mummert was authorized to continue dealing in firearms under the business license after Mack left the business.

Mummert's motion is premature, and granting it would have the effect of preventing a jury from considering the strengths and weaknesses of the case and making a decision regarding Mummert's guilt. Mummert has failed to cite any statute or case law that would allow the court to weigh the evidence and make such a decision prior to trial. Indeed, the law is to the contrary. *See United States v. Critzer*, 951 F.2d 306, 307-08 (11th Cir. 1992) (rules do not provide for pretrial determination of sufficiency of evidence, and no summary judgment procedure exists in criminal cases) (cited with approval in *United States v. Ferro*, 252 F.3d 964, 968 (8th Cir. 2001)). Mummert's motion should be denied on this basis.

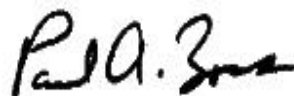
### ***CONCLUSION***

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections to this Report and Recommendation as specified below, that Mummert's motion to dismiss be **denied**.

Any party who objects to this report and recommendation must serve and file specific, written objections **by no later than July 18, 2005**. Any response to the objections must be served and filed **by July 22, 2005**.

**IT IS SO ORDERED.**

**DATED** this 11th day of July, 2005.



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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT